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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2115 OF 1999

TATA ENGINEERING & LOCOMOTIVE
COMPANY LTD. ... Petitioner

V/s

1. Shri Ishwarchand Tarachand Jain
& anr. ... Respondents

Mr. C.U. Singh with Mr. Kiran Bapat and Mr. Niranjan Mogre i/by Haresh Mehta & Co. for the petitioner.

Mr. P.S. Moholkar for the respondent No.1.

CORAM: SMT. NISHITA MHATRE, J.

DATED: 21ST AUGUST, 2007.

ORAL JUDGMENT:

1. The petitioner has challenged the Award Part-II passed in Reference (IDA) No. 176 of 1991.

2. The 1st respondent was employed with the petitioner from 25.9.1978 as a Miller. It appears that from November 1984 to October 1985, the 1st respondent remained absent for 75 days on 39 occasions. This absence was besides the days when the 1st respondent did not attend the work because of weekly off, paid holidays and sanctioned leave. The petitioner suspended the 1st respondent for one day by way of punishment for the

aforesaid absence. This punishment did not improve matters and from January 1986 to June 1986, the 1st respondent remained unauthorizedly absent again for 45 days on 24 different occasions. This absence was besides the days of weekly offs, paid holidays and sanctioned leave. The 1st respondent was suspended for two days for his unauthorised absence. The 1st respondent, again despite these punishments remained unauthorizedly absent for 83 days on 35 different occasions during the period from July, 1986 to December, 1986. He was suspended for four days. Even this suspension by way of punishment did not bring about any change in the conduct of respondent No.1. He remained absent for 56 days on 24 different occasions from March, 1987 to June, 1987.

3. A charge-sheet was issued to the 1st respondent on 26th October, 1987 alleging that he had committed a misconduct under clause 24(f) of the Model Standing Orders by remaining habitually absent. The 1st respondent tendered his explanation to the charge-sheet stating that he was absent because he had certain financial difficulties which compelled him to remain absent.

4. Not being satisfied with the explanation tendered by

the 1st respondent, the petitioner conducted an enquiry against the 1st respondent. The Enquiry Officer held that the charges have been proved by the petitioner. He submitted his report declaring that the 1st respondent was guilty of habitual absenteeism. The petitioner dismissed the 1st respondent on 26.1.1988 after considering the findings of the enquiry officer. An application under Sec. 33(2)(b) was filed by the petitioner on the same day for approval of its order of dismissal by the Industrial Court. This application was not contested by the 1st respondent and, therefore, the Industrial Tribunal, before whom the reference in respect of bonus was pending, granted approval to the order dated 26.1.1988.

5. The 1st respondent raised an industrial dispute which was referred for adjudication before the Labour Court. Pleadings were filed by the parties. The 1st respondent contended that the enquiry was not conducted in a fair and proper manner and that the findings of the enquiry officer were perverse. In the written statement, the petitioner mentioned the unauthorized absence which the 1st respondent had indulged in for several years. The Labour Court, by an Award Part-I held that the enquiry instituted against the 1st respondent was conducted in a fair and proper manner and

that the findings were not perverse. The 1st respondent led evidence before the Labour Court, although he did not lead any evidence before the enquiry officer. He admitted in his evidence before the Labour Court that, at times he proceeded on leave without getting it sanctioned. It was only after he reported for duty after availing the leave that he got the leave sanctioned. He has admitted that in the past he was punished by suspension on three different occasions for the misconduct of absenteeism.

6. By Award Part-I, the Labour Court held that the findings of the enquiry officer were not perverse and that the misconduct had been proved. The Labour Court allowed the Reference partly by Award Part-II. The Labour Court came to the conclusion that, in the year preceeding the issuance of the charge-sheet, the 1st respondent had not completed 240 days in service and, therefore, was not entitled to any privilege leave. However, the Labour Court was of the view that the punishment of dismissal was too harsh in view of the judgment of the Karnataka High Court, reported in **1996 I C.L.R. 188.** The Labour Court held that the workman had been out of service for 10 years and, therefore, awarded reinstatement with continuity of service but without back wages.

7. The learned advocate appearing for the petitioner submits that, a workman with such a leave record cannot be continued in employment indefinitely by the employer. It is submitted that the past record of the 1st respondent was so dissatisfactory that the petitioner had no option but to take action against him. Several opportunities were given to him to improve his behaviour despite which the workman chose to take his attendance for work lightly and continued with his miserable leave record. Reliance is placed on the judgments reported in **2001 (91) F.L.R. 933, between N.R.C. Ltd. v/s N.R.C. Employees Union and in Writ Petition No. 3612 of 1994 decided on 29.6.2004.**

8. The learned advocate for the 1st respondent submits that the petitioner has not considered the explanation tendered by the 1st respondent on 27.10.1987. He submits that this explanation indicates that although the 1st respondent had admitted his unauthorised absence, it was because of his economic and financial constraints that in the preceding two years the workman had lost his mental balance due to which he remained absent. The workman had, by his explanation, sought the employer’s indulgence and requested the employer to pardon him. The learned advocate further submits that

10 years of unemployment is sufficient punishment for his unauthorised absence. He submits that the 1st respondent has been out of employment from 1988 onwards till today; the Labour Court has granted relief in the nature of re-employment to the workman. According to the learned advocate, no financial burden has been cast by the Labour Court on the petitioner as it has been directed to reinstate the workman with continuity of service but without payment of back wages. In these circumstances, it is submitted that the order of the Labour Court should be upheld.

9. On perusing the Award Part-II of the Labour Court, I find that the Labour Court was impressed by the judgment of the Karnataka High Court which he has wrongly termed "the parent High Court". The Labour Court has arrived at the conclusion that the misconduct had been proved. The Labour Court has also considered the past service record of the workman. Despite this, the Labour Court held that since in the case before the Karnataka High Court, remaining absent from service for five years was condoned, the same relief could be granted in the present case. The Labour Court observed that in this case the workman had remained out of service for 10 years and that by itself is a punishment commensurate with the misconduct committed by the 1st respondent.

10. In my view, the Labour Court has erred in granting relief to the workman. The judgment of the Karnataka High Court, which has been relied on by the Labour Court, has viewed unauthorised absence seriously although that was a case in respect of a person who was employed as a Watchman/Peon in the Court of the Munsiff at Kadur. While granting relief to the workman in the facts and circumstances of that case, the Karnataka High Court has observed thus -

> "4. On the point of the gravity of punishment, petitioner's learned Advocate alludes to the well known plea that in these difficult times, the deprivation of employment is synonymous with economic death. She therefore submits that where extreme cases of dishonesty are established or where a misconduct is persistent or where the misconduct which is so extremely gross as to warrant a removal from service alone that the punishment would have been justified. In the instant case, the submission is that even though the petitioner did remain absent from his duties for four months, that there were some extenuating circumstances. It may be that he ran into financial difficulties and in a weak moment he borrowed money and thereafter the consequences followed, but except for this one occasion, the petitioner had an unblemished service record for 8 years. The fact that this was a solitary instance is something that the various authorities have overlooked right through. I do not propose to condone what the petitioner has done nor do I propose to take it as lightly as the petitioner's learned advocate submits that it should be. To my mind, every form of employment regardless of the status or level has to be accompanied with a certain level of interest and devotion to duty. Cases are rampant particularly among Government servants

where the assumption is that they can get away with any form of misbehaviour. Staying away from duty has almost become chronic because of the confidence that the consequences will not be serious. Under these circumstances, unauthorised absence will have to be viewed at very seriously and is not to be taken as lightly as is sought to be made out. It would become impossible for the Government Departments to even function if such acts were to be condoned. I am fully in agreement with the submissions canvassed by the learned Government Advocate when he points out that this aspect of the matter lends considerable gravity to the misconduct. I need to further observe that in the present economic context where unemployment is one of the biggest economic problems, if those who are holding jobs are not interested in them and decide to irresponsibly stay away from their work, such an employer would be fully justified in getting rid of them and filling those posts with more worthy candidates."

11. In the case of **N.R.C. Ltd. (supra),** a learned Single Judge of this Court has observed thus -

"8. There can be no doubt about the principle of law that under Section 11-A of the Industrial Disputes Act, 1947, the Industrial Court or the Labour Court as the case may be, is vested with a wholesome discretion to determine as to whether the findings which have been arrived at in the course of a disciplinary enquiry are sustainable and on the question as to whether the quantum of punishment that has been awarded by the employer is proper even assuming that the charge of misconduct is proved. But like all discretion which is vested in a body which is conferred with judicial power, the discretion under Section 11-A has to be exercised judiciously having regard to the facts and circumstances of each case. The exercise of discretion cannot be justified with reference to a desire to do equity de-hors the circumstances of the particular case at hand, the nature of the misconduct which has been established, and the

> past record of the workman. The relevant facts and circumstances of each case have to be evaluated by the Labour Court or as the case may be, the Industrial Court. The findings of the Labour Court in this case have been extracted verbatim and these findings would leave no manner of doubt that the discretion which has been exercised by the Labour Court has not been exercised judiciously and on the basis of considerations germane to the jurisdiction of the Court under Section 11-A of the Act. In these circumstances, the exercise of discretion is liable to be interfered with even within the parameters of the jurisdiction which is conferred on this Court under Article 226 of the Constitution."

12. In Writ Petition No. 3612 of 1994, it has been observed that, a workman who remains unauthorizedly absent cannot be reinstated unless there are mitigating circumstances to warrant a lesser punishment.

13. In the present case, the only circumstance brought to my notice by the learned advocate for the respondent is that the 1st respondent was suffering from several hardships due to which he was required to remain absent from duty. In my opinion, this explanation which the workman has given is not adequate. It must be noted that in his explanation he has stated that he was suffering from mental instability due to his difficulties. However, in his evidence he has stated that he remained absent because he had to accompany his sister-in-law who was undergoing medical treatment for mental imbalance. In such circumstances, the stand

taken by the 1st respondent cannot be believed. Apart from this, his past service record is dismal and does not warrant a lenient view in the matter.

14. The Award of the Labour Court is, therefore, set aside.

15. Rule made absolute. No costs.

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